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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 MAXIMILLIAN KLEIN, *et al.*,

12 Plaintiffs,

13 v.

14 META PLATFORMS, INC.,

15 Defendant.
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Consolidated Case No. 3:20-cv-08570-JD

**[PROPOSED] ORDER GRANTING
CONSUMER PLAINTIFFS' MOTION
TO EXCLUDE PORTIONS OF THE
EXPERT REPORT AND TESTIMONY
OF DR. CATHERINE TUCKER**

The Hon. James Donato

17 This document relates to: *All Consumer Actions*
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Hearing Date: Dec. 14, 2023
Hearing Time: 10:00 a.m.
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Now before the Court is Consumer Plaintiffs’ Motion to Exclude Portions of the Expert Report and Testimony of Dr. Catherine Tucker (the “Motion”). The Court, having considered the Motion and its accompanying memorandum, hereby finds that the Motion is **GRANTED**.

Expert opinion evidence is admissible under Federal Rule of Evidence 702 unless “the proponent demonstrates that the expert is qualified and (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” *Stiner v. Brookdale Senior Living, Inc.*, No. 17-cv-03962-HSG, 2023 WL 2722294, at *5 (N.D. Cal. Mar. 30, 2023). The proponent of the opinion bears the burden of establishing each element. *Cabrera v. Google LLC*, No. 5:11-cv-01263-EJD, 2022 WL 4468266, at *2 (N.D. Cal. Sept. 26, 2022). The Court, accordingly, may “exclude junk science.” *Day v. GEICO Cas. Co.*, No. 21-cv-02103-BLF, 2022 WL 16556802, at *2 (N.D. Cal. Oct. 31, 2022).

Consumer Plaintiffs’ expert, Dr. Nicholas Economides—a Professor of Economics at the Stern School of Business of New York University—offers a number of opinions in this litigation, one of which is that there is a methodology to calculate class wide *and* individual damages from the *but-for* world where Facebook would need to make complete disclosures about its data collection and use practices and compensate class members in return. To offer this opinion, Dr. Economides draws on twelve, real world yardstick programs (including from Facebook itself) that identify the market price users receive when paid for their data.

Facebook’s expert, Dr. Catherine Tucker, makes a number of criticisms of these yardstick programs, but one criticism must be excluded from the record. Dr. Tucker makes the misguided criticism that these yardsticks are flawed because they are not in the same relevant product market as Facebook itself (namely, the personal social network market). “[T]he yardstick approach is a well-established methodology’ in antitrust actions.” *Moehrl v. The Nat’l Assoc. of Realtors*, No. 1:19-cv-01610, 2023 WL 2683199, at *8 (N.D. Ill. Mar. 29, 2023) (citing *In re Dealer Mgmt. Sys.*, 581 F.

1 Supp. 3d 1029, 1073 (N.D. Ill. 2022). *See also Fishman v. Est. of Wirtz*, 807 F.2d 520, 551 (7th Cir.
 2 1986) (“The concept of a ‘yardstick’ measure of damages, that is, linking the plaintiff’s experience in
 3 a hypothetical free market to the experience of a comparable firm in an actual free market, is . . . well
 4 accepted.”).

5 Dr. Tucker criticizes this yardstick methodology, in part, because it supposedly “makes no
 6 attempt to connect its yardstick programs to the alleged ‘Personal Social Network Market,’” Tucker
 7 VII.A.2, and because the personal social network market “does not include any of the yardstick
 8 programs.” Tucker ¶ 192 (criticizing the yardsticks because they lack the characteristics of the
 9 personal social network program, including “the ability to find family and friends,” a “centralized
 10 activity feed,” a means to communicate with other participants “by posting or commenting” or a
 11 “social graph.”); *id.* (criticizing criticizes Dr. Economides for using the prices offered by these
 12 market research programs “which are not in the alleged ‘Personal Social Network Market’” as
 13 yardsticks for the monetary compensation that would have been paid to users in the *but-for* world.).
 14 Said another way, Dr. Tucker criticizes the dozen yardsticks Dr. Economides identified and used for
 15 his analysis ***because they themselves are not in the same relevant market as*** Facebook. Dr. Tucker’s
 16 mistake is somewhat shocking for an economist because it fundamentally misunderstands the
 17 purposes of a yardstick program. However, when asked at her deposition, Dr. Tucker conceded she
 18 had never performed a yardstick damages analysis herself, perhaps identifying the reason for her
 19 clear error. *See* Ex. 75, Tucker Dep. 297:23–298:6.

20 To put it plainly, Dr. Tucker has confused yardsticks with “before-and-after” benchmarks. As
 21 explained by Drs. Rubinfeld and McCrary in *Measuring Benchmark Damages in Antitrust*
 22 *Litigation*—an article that Dr. Tucker herself cites in her report—in the yardstick method, “one
 23 compares prices during the period in which the antitrust violation is believed to have had an effect
 24 (the ‘impact period’) to prices in other markets that are deemed to be reasonably comparable to the
 25 market at issue.” Tucker ¶ 195 fn.436; *see also* Justin McCrary and Daniel L. Rubinfeld, *Measuring*
 26 *Benchmark Damages in Antitrust Litigation*, 3 Journal of Econometric Methods 63–74 (2014). This
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1 is different from a benchmark approach, which “refers to comparisons to the same market but in a
2 time period free from the conduct, and yardstick refers to comparisons to other markets in the same
3 time period.” Economides Reply ¶ 142. Because Facebook has dominated the personal social
4 network market for so long, a “pre-conduct” benchmark was not feasible here—a point Dr. Tucker
5 does not contest. Economides Reply ¶ 142. Instead, Dr. Economides turned to the series of twelve
6 yardsticks where multiple different companies (including Facebook itself) compensated users for the
7 same sort of data at issue in this case.

8 Paragraphs 189 through 197 of Dr. Catherine Tucker’s Report, and any other testimony that
9 Dr. Nicholas Economides’s yardstick methodologies are flawed either because the entities are not in
10 the relevant market or because the entities are not comparable, is hereby excluded from the record
11 under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and related precedents.

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13 **IT IS SO ORDERED.**

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15 Dated: _____, 2023

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17 HONORABLE JAMES DONATO
18 UNITED STATES DISTRICT JUDGE
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